

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

AMANDA HUNTER,)	
)	No. CV-05-0252-MWL
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
JO ANNE B. BARNHART,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on May 8, 2006. (Ct. Rec. 9, 14). Plaintiff Amanda Hunter ("Plaintiff") did not submit a reply brief. Attorney Clifford King B'Hymer represents Plaintiff; Special Assistant United States Attorney Stephanie R. Martz represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 14) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 9).

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JURISDICTION

On December 3, 2002, Plaintiff applied for Disability Insurance Benefits ("DIB") alleging disability since June 26, 2002, due to fibromyalgia and hearing loss. (Administrative Record ("AR") 51-53, 61). Her application was denied initially and on reconsideration. On January 26, 2005, Plaintiff appeared before Administrative Law Judge ("ALJ") Paul Gaughen, at which time testimony was taken from Plaintiff and vocational expert Debra Uhlenkott. (AR 259-294). On March 10, 2005, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 12-23). The Appeals Council denied a request for review on June 27, 2005. (AR 4-6). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g) on August 18, 2005. (Ct. Rec. 1).

STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcript, the ALJ's decision, the briefs of both Plaintiff and the Commissioner and will only be summarized here. Plaintiff was 32 years old on the date of the ALJ's decision, has a high school education and attended three years of college. (AR 12, 67). Plaintiff has past relevant work as a laboratory technician in a food processing plant (light, semi-skilled), a bookstore clerk (light, medium as performed, semi-skilled), and a cook/wait person (light, semi-skilled). (AR 85, 280).

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1 At the administrative hearing held on January 26, 2005,
2 Plaintiff testified that she stands 5'1" tall and weighs 180
3 pounds. (AR 266). She testified that she has not worked since
4 June of 2002. (AR 266). She reported that her most significant
5 problem that interferes with her ability to work is constant pain
6 in her joints (elbows, shoulders, hips, knees, feet, hands and
7 back). (AR 266). She stated that the constant pain causes her to
8 be tired or fatigued, and she would not be a very reliable
9 employee because she would have to call in sick often. (AR 266).
10 She indicated that she was in pain all the time, even when she is
11 not physically active. (AR 267).

12 Plaintiff testified that she is able to walk two blocks
13 without having to take a break. (AR 267). She stated that when
14 she experiences discomfort from walking, she eases the pain by
15 sitting down for 15 to 20 minutes and elevating her feet. (AR
16 268). She stated that she sits about 80 percent of the day and
17 takes an afternoon nap in order to have energy in the evening to
18 make dinner for her husband. (AR 268-269). She reported that two
19 or three days a week she experiences so much pain that she is not
20 able to drive. (AR 270). She also stated that five or six days
21 per week her fatigue impairs her short-term memory for a large
22 portion of the day. (AR 273). However, she indicated that her
23 ability to concentrate remained "okay." (AR 273).

24 Plaintiff testified that she can stand for only about 15
25 minutes before her knees and back bother her, and she is only
26 capable of sitting for 15 to 20 minutes at a time. (AR 270-271).
27 She indicated that she could kneel for a while, but does not kneel
28 often, and can reach above shoulder level. (AR 271-272). She

1 stated that she is not able to bend at the waist, or push and pull
2 for longer than one or two minutes at a time. (AR 271-272).

3 Plaintiff testified that she has problems with depression and
4 anxiety and experiences panic attacks once or twice every two or
5 three months. (AR 275-276). She reported that she also has
6 tension headaches three or four times a week. (AR 277-278). She
7 also has difficulty with hearing but is able to read lips. (AR
8 278).

9 Also giving testimony at the administrative hearing held on
10 January 26, 2005, was vocational expert Debra Uhlenkott (AR 279-
11 289). The ALJ gave Ms. Uhlenkott three different hypotheticals,
12 and, as to each, the vocational expert testified there were jobs
13 available which the hypothetical individual could perform despite
14 the listed limitations. (AR 280-283).

15 On cross-examination, Ms. Uhlenkott testified that there were
16 no unskilled or low-skilled jobs that would accommodate an
17 individual's need to miss more than three days of work per month
18 due to physical pain and marked fatigue. (AR 286). She
19 additionally testified that if an individual must lay down at
20 unpredictable intervals throughout the day, three or four times a
21 day, at least 20 to 30 minutes at a time, there would be no jobs
22 this individual could perform. (AR 288). Plaintiff's attorney
23 suggested that these hypotheticals were based on limitations from
24 a report administered by a Dr. Rushi. (AR 289). Plaintiff
25 testified that, at the time of the administrative hearing, Dr.
26 Rushi had been her primary care physician for about one month but
27 that she had not seen Dr. Rushi prior to that period of time. (AR
28 289).

SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the "Act") defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if his impairments are of such severity that Plaintiff is not only unable to do his previous work but cannot, considering Plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is engaged in substantial gainful activities. If he is, benefits are denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the decision maker proceeds to step two, which determines whether Plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

If Plaintiff does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which compares Plaintiff's impairment with a number of listed

1 impairments acknowledged by the Commissioner to be so severe as to
2 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
3 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
4 meets or equals one of the listed impairments, Plaintiff is
5 conclusively presumed to be disabled. If the impairment is not
6 one conclusively presumed to be disabling, the evaluation proceeds
7 to the fourth step, which determines whether the impairment
8 prevents Plaintiff from performing work he has performed in the
9 past. If Plaintiff is able to perform his previous work, he is
10 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
11 cannot perform this work, the fifth and final step in the process
12 determines whether Plaintiff is able to perform other work in the
13 national economy in view of his residual functional capacity and
14 his age, education and past work experience. 20 C.F.R. §§
15 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

16 The initial burden of proof rests upon Plaintiff to establish
17 a *prima facie* case of entitlement to disability benefits.
18 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
19 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
20 met once Plaintiff establishes that a physical or mental
21 impairment prevents him from engaging in his previous occupation.
22 The burden then shifts to the Commissioner to show (1) that
23 Plaintiff can perform other substantial gainful activity and (2)
24 that a "significant number of jobs exist in the national economy"
25 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
26 (9th Cir. 1984).

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STANDARD OF REVIEW

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court

1 may not substitute its judgment for that of the Commissioner.
2 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
3 (9th Cir. 1984). Nevertheless, a decision supported by
4 substantial evidence will still be set aside if the proper legal
5 standards were not applied in weighing the evidence and making the
6 decision. *Browner v. Secretary of Health and Human Services*, 839
7 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
8 evidence to support the administrative findings, or if there is
9 conflicting evidence that will support a finding of either
10 disability or nondisability, the finding of the Commissioner is
11 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
12 1987).

13 ALJ'S FINDINGS

14 The ALJ found at step one that Plaintiff has not engaged in
15 substantial gainful activity since her alleged onset date. (AR
16 13). At step two, the ALJ determined that Plaintiff has the
17 severe impairments of fibromyalgia, pain disorder associated with
18 psychological factors and a general medical condition, and
19 bilateral hearing loss, but that she does not have an impairment
20 or combination of impairments listed in or medically equal to one
21 of the Listings impairments. (AR 18). The ALJ specifically found
22 that Plaintiff's diagnosis of major depressive disorder was non-
23 severe and reports of GERD and ganglion cyst in the right ankle
24 appeared resolved and were also not severe impairments. (AR 17-
25 18).

26 The ALJ concluded that Plaintiff retained the residual
27 functional capacity ("RFC") to preform light exertion work and
28 that she would be further limited to only occasional bending,

1 stooping and kneeling, she has severe hearing impairments
2 requiring the use of hearing aides but is capable of hearing work
3 conversation but may be delayed as she reads lips, and should not
4 work in dangerous industrial settings as she may not hear safety
5 warnings. (AR 21).

6 At step four of the sequential evaluation process, and based
7 on her RFC and the vocational expert's testimony, the ALJ found
8 that Plaintiff was able to perform her past relevant work as a
9 gift/bookstore clerk and as a cook/wait person. (AR 22).
10 Accordingly, the ALJ determined at step four of the sequential
11 evaluation process that Plaintiff was not disabled within the
12 meaning of the Social Security Act. (AR 22-23).

13 ISSUES

14 Plaintiff contends that the Commissioner erred as a matter of
15 law. Plaintiff's primary argument is that the ALJ erred by
16 failing to discuss a report apparently authored by Plaintiff's
17 treating physician, Dr. Rushe or Dr. Rusche. Plaintiff also
18 asserts that the ALJ failed to provide adequate reasons for
19 finding her testimony not entirely credible in this case.

20 This Court must uphold the Commissioner's determination that
21 Plaintiff is not disabled if the Commissioner applied the proper
22 legal standards and there is substantial evidence in the record as
23 a whole to support the decision.

24 DISCUSSION

25 **A. Missing Medical Report**

26 Plaintiff's main assertion is that the ALJ erred by failing
27 to address a medical report completed by Plaintiff's treating
28 physician on January 12, 2005. (Ct. Rec. 9-2, pp. 4-12).

1 Plaintiff asserts that the ALJ failed to mention this "highly
2 probative report," and noted that the report is further not listed
3 in the exhibit list attached to the hearing decision evidencing
4 the fact that the ALJ either lost or misplaced said report. (Ct.
5 Rec. 9-2, pp. 4-5). Plaintiff argues that the ALJ should have
6 credited Dr. Rusche's opinions, as set forth in this missing
7 report, and, taking into consideration the vocational expert's
8 testimony regarding Dr. Rusche's report, the ALJ should have
9 concluded that Plaintiff is disabled. (Ct. Rec. 9-2, pp. 11-12).
10 The Commissioner responds that there is no evidence that the ALJ
11 or the Appeals Council ever received or had the opportunity to
12 review the report of Dr. Rusche. (Ct. Rec. 15, pp. 6-12).

13 Plaintiff first presented to Dr. Rusche on November 22, 2004.
14 (AR 242).¹ Dr. Rusche indicated that Plaintiff complained of
15 hearing loss, fibromyalgia, panic disorder, and major depression
16 and reported a usual pain level of 3 out of 5. (AR 242).
17 However, Dr. Rusche remarked that Plaintiff left the office with a
18 level of 2 out of 5 pain. (AR 242). It was noted at that time
19 that Plaintiff was awaiting a disability hearing. (AR 242).

20 On January 12, 2005, Dr. Rusche reported that Plaintiff
21 returned in order to complete paperwork for her attorney since she
22 was seeking disability. (AR 244). Dr. Rusche assessed a hearing
23 impairment and fibromyalgia and indicated that a form was

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26 ¹Dr. Rusche was not Plaintiff's "long time attending physician" as
27 alleged by Plaintiff. (Ct. Rec. 9-2, p. 4). Dr. Rusche took over
28 Plaintiff's care only after treating physician Desanu moved to New York.
(AR 289). In fact, it appears that Plaintiff had seen Dr. Rusche on only one
prior occasion before Dr. Rusche completed paperwork pertaining to her
disability claim.

1 completed with regard to Plaintiff's disability claim. (AR 244).
2 It is of interest to note that Dr. Rusche did not mention any
3 limitations in her January 12, 2005 medical report despite
4 indicating that she had completed the disability form for
5 Plaintiff. (AR 244). The form, which presumably is the report
6 that Plaintiff complains was not discussed by the ALJ, is not
7 included in Dr. Rusche's treatment records in the administrative
8 record. Although Plaintiff alleges she has provided this missing
9 report of Dr. Rusche at all stages of her appeal process (Ct. Rec.
10 9), there is additionally no record that the ALJ ever received
11 this report, the Appeals Council does not document that it
12 received the report (AR 4-6), and, significantly, although
13 Plaintiff claims to have attached a copy of this report to her
14 opening brief in this Court, the report is not attached to her
15 brief, it has not been otherwise filed with this Court, and the
16 undersigned thus has no means of reviewing the actual document at
17 issue.

18 Moreover, although Plaintiff claims that "the importance of
19 said report was fully discussed at plaintiff's hearing," (Ct. Rec.
20 9-2, p. 4), at the administrative hearing, Plaintiff's counsel
21 only indicates that his hypotheticals are based on limitations
22 "listed by her attending physician" (AR 286) and "from Dr. Rushi's
23 report" (AR 289). At no time did Plaintiff's counsel "fully
24 discuss the importance" of a report completed by Dr. Rusche. (AR
25 259-294).² In any event, a review of the medical record in its
26 entirety, including the argument provided by the parties

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28 ²There is no reference to the missing report as an exhibit by
Plaintiff's counsel, nor any inquiry or discussion of the substance of that
report other than the reference already noted.

1 pertaining to Dr. Rusche's missing report, supports a conclusion
2 that the ALJ's decision should be affirmed.

3 On February 25, 2003, a state agency reviewing physician,
4 filled out a Physical Residual Functional Capacity Assessment
5 form. (AR 123-128). The form indicates that Plaintiff could
6 occasionally lift and/or carry 20 pounds, frequently lift and/or
7 carry 10 pounds, sit, stand or walk about six hours in an eight
8 hour workday and push or pull without restriction. (AR 124). No
9 postural, manipulative, visual or environmental limitations were
10 indicated. (AR 125-126).

11 On May 23, 2003, another Physical Residual Functional
12 Capacity Assessment form was completed by a state agency reviewing
13 physician, Morris Fuller, M.D. (AR 131-136). The form indicates
14 that Plaintiff could occasionally lift and/or carry 20 pounds,
15 frequently lift and/or carry 10 pounds, sit, stand or walk about
16 six hours in an eight hour workday and push or pull without
17 restriction. (AR 132). No postural, manipulative, visual or
18 environmental limitations were noted. (AR 133-134). Dr. Fuller
19 noted that Plaintiff indicates that she is in constant pain, but
20 tells her physician that medication controls her pain well and she
21 has no problems. (AR 135).

22 On June 10, 2003, Rebecca J. Alexander, Ph.D., examined
23 Plaintiff and essentially found her to be unimpaired from a
24 psychological standpoint. (AR 137-141). Plaintiff reported that
25 she was not currently depressed (AR 139, 141), and the results of
26 the mental status exam revealed an intact short, intermediate and
27 long term memory, fund of information and ability to calculate
28 math were within normal limits, abstract thinking and judgment

1 appeared to be intact, she could care for her personal needs and
2 cook given a short time span for standing, her ability to
3 understand and remember simple to detailed instructions was
4 unimpaired, and her ability to sustain concentration and persist
5 seemed to be unimpaired during the exam. (AR 141). Dr. Alexander
6 diagnosed a pain disorder associated with both psychological
7 factors and a general medical condition and assessed a global
8 assessment of functioning ("GAF") score of 60.³ (AR 140).

9 On June 25, 2003, Christina Bjornstad, M.D., examined
10 Plaintiff and found minimal physical findings. (AR 142-143). Dr.
11 Bjornstad indicated that Plaintiff's hearing was intact and that
12 Plaintiff was able to hear her even when she spoke softly and even
13 if Plaintiff was not looking at her as she spoke softly. (AR
14 142). Dr. Bjornstad assessed subjective pain, restlessness and
15 depression and noted that Plaintiff was very focused on her pain
16 and even keeps an hour-to-hour diary of her pain which she
17 reviewed with her husband daily. (AR 143).

18 A Psychiatric Review Technique form was completed by a
19 reviewing state agency medical professional, Edward T. Beaty,
20 Ph.D., on August 21, 2003. (AR 147-160). It was noted that
21 Plaintiff's depression was improved with medication. (AR 150).
22 Dr. Beaty opined that Plaintiff had no restrictions of activities
23 of daily living, mild difficulties in maintaining social
24 functioning, mild difficulties in maintaining concentration,
25 persistence or pace and one or two episodes of decompensation.
26 (AR 157).

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28 ³A GAF of 60-51 reflects: Moderate symptoms or moderate difficulty in
social, occupational, or school functioning. See DIAGNOSTIC AND STATISTICAL MANUAL
OF MENTAL DISORDERS 32 (4th ed. 1994).

1 On December 10, 2003, Dr. Dasanu indicated that Plaintiff was
2 started on medication for her depression and she was "doing great"
3 and "not depressed." (AR 232). On February 24, 2004, Plaintiff
4 reported to Dr. Dasanu that she "feels well." (AR 236).
5 Plaintiff indicated that her depression was in very good control,
6 she was not depressed at that point and she was less anxious with
7 less panic attacks. (AR 236). Dr. Dasanu noted that Plaintiff's
8 fibromyalgia was controlled with Tylenol and that Plaintiff was
9 able to care for pets and perform housework. (AR 236). On April
10 26, 2004, Plaintiff reported to Dr. Dasanu that she was walking
11 and exercising. (AR 239). It was noted that her muscle
12 tenderness was much less and she appears to hear pretty well using
13 her hearing aids. (AR 239). No tender points were found on exam.
14 (AR 239). On June 1, 2004, Plaintiff reported to Dr. Dasanu that
15 she "feels well." (AR 241). Dr. Dasanu indicated that Plaintiff
16 complained of mild bloating but "otherwise she's fine." (AR 241).

17 On August 31, 2004, Plaintiff presented to Celso Chavez,
18 M.D., and indicated she was "doing well with her current
19 medication regimen." (AR 250-251). Dr. Chavez noted that
20 Plaintiff had no depression, anxiety or agitation. (AR 251).
21 However, on October 11, 2004, Plaintiff reported to the same
22 office and complained to Terry Smith, M.D., of constant shoulder
23 pain. (AR 252-253). X-rays were negative and she was referred to
24 physical therapy. (AR 253). On October 25, 2004, Plaintiff
25 returned to Dr. Smith requesting that a disability form be
26 completed. (AR 254-255). Plaintiff reported that she had been
27 going to physical therapy and felt it was helping. (AR 254).

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1 Dr. Smith noted that Plaintiff's physical exam revealed a well
2 nourished, well hydrated individual in no acute distress. (AR
3 254). Dr. Smith assessed that Plaintiff's shoulder pain had
4 improved. (AR 254). As noted by the Commissioner, there is no
5 evidence that Dr. Smith completed the requested disability
6 paperwork. (Ct. Rec. 15, p. 10).

7 According to Plaintiff, Dr. Rusche's missing report indicates
8 that Plaintiff suffers from several symptoms as a result of
9 fibromyalgia, she suffers significant bilateral pain in several
10 locations throughout her body, her prognosis was poor, her pain
11 would frequently interfere with attention and concentration, she
12 would be moderately to markedly limited in her ability to deal
13 with work stress, she could sit, stand or walk for no more than 15
14 to 30 minutes intervals and she would miss more than three days of
15 work per month. (Ct. Rec. 9-2, pp. 5-7).

16 The ALJ is responsible for reviewing the evidence and
17 resolving conflicts or ambiguities. *Magallanes*, 881 F.2d at 751.
18 If evidence supports more than one rational interpretation, the
19 Court must uphold the decision of the ALJ. *Allen*, 749 F.2d at
20 579. It is the role of the trier of fact, not this Court, to
21 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. The
22 Court thus has a limited role in determining whether the ALJ's
23 decision is supported by substantial evidence and may not
24 substitute its own judgment for that of the ALJ even if it might
25 justifiably have reached a different result upon de novo review.
26 42 U.S.C. § 405(g). Nevertheless, a review of Plaintiff's
27 recitation of Dr. Rusche's findings in the missing report reveals
28 limitations entirely inconsistent with the substantial weight of

1 the record evidence as discussed above. (Ct. Rec. 9-2, pp. 5-7).
2 No other medical professional of record has listed restrictions as
3 significant as those apparently listed in the missing report. In
4 fact, a review of the record reveals that Plaintiff's physical and
5 mental symptoms were fairly well controlled by medication. *Supra*.
6 Although the missing report is not addressed by the ALJ, had it
7 been before the ALJ, it is clearly inconsistent with all other
8 medical evidence of record. Accordingly, the undersigned finds
9 that the ALJ did not err by failing to refer to the missing report
10 in his decision. The ALJ's RFC determination is in accord with
11 the substantial weight of the record evidence and free of error.

12 **B. Credibility**

13 Plaintiff also argues that the ALJ erroneously determined
14 that she was not credible. (Ct. Rec. 9-2, pp. 9-11).

15 It is the province of the ALJ to make credibility
16 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
17 1995). However, the ALJ's findings must be supported by specific
18 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
19 1990). Once the claimant produces medical evidence of an
20 underlying impairment, the ALJ may not discredit his testimony as
21 to the severity of an impairment because it is unsupported by
22 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
23 1998) (citation omitted). Absent affirmative evidence of
24 malingering, the ALJ's reasons for rejecting the claimant's
25 testimony must be "clear and convincing." *Lester v. Chater*, 81
26 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:
27 rather the ALJ must identify what testimony is not credible and

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1 what evidence undermines the claimant's complaints." *Id.*; *Dodrill*
2 *v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

3 The ALJ considered the evidence and testimony of record and
4 determined that Plaintiff was not totally credible. (AR 19-21,
5 22). The ALJ indicated that he was influenced by the
6 inconsistency between the bulk of the medical records and
7 Plaintiff's testimony and the fact that the evidence failed to
8 demonstrate that she is totally disabled. (AR 19). He found that
9 the records from her treating and consulting physicians did not
10 support her opinion that she is unable to perform any work
11 activities. (AR 19).

12 In support of his finding that Plaintiff is not totally
13 credible, the ALJ indicated that, although Plaintiff testified to
14 significant limitations in her ability to sit and stand, that she
15 is unable to vacuum, that she has flu-like symptoms and constant
16 fatigue, and that her memory is impaired or affected, the constant
17 flu-like symptoms are not reported to her examining doctors, she
18 reports being able to garden and care for pets, it is noted that
19 she is walking and that exercises help her out with her
20 fibromyalgia, she reports she is not depressed or anxious and is
21 not having any trouble with significant pressure points, her back
22 pain is much improved, and it is noted she is doing well after
23 discontinuing her opioids. (AR 19). The ALJ also indicated that
24 Dr. Bjornstad noted Plaintiff's physical findings were very
25 minimal and her deafness is clear and documented but she is able
26 to compensate for her deafness quite well, and records from her
27 treating physician indicate that she is doing great and is not
28 depressed. (AR 19). With regards to her fibromyalgia, the ALJ

1 indicated that Plaintiff was noted to be taking Tylenol on only an
2 as needed basis, it was noted that she had not had much muscular
3 pain lately, and, on February 24, 2004, she reported that she has
4 good control of her pain. (AR 19). The ALJ found that Plaintiff
5 described daily activities that are not limited to the extent one
6 would expect, given her complaints of disabling symptoms and
7 limitations, as she has reported to spending time with her husband
8 and mother, crocheting, walking, reading, watching television,
9 cooking simple recipes, and doing the laundry and dishes. (AR 19-
10 20). The ALJ noted that, on November 13, 2003, Plaintiff reported
11 normal energy, motivation, and concentration, no excessive
12 tearfulness, no feelings of guilt or worthlessness, and normal
13 appetite and sleep. (AR 20). The ALJ indicated that, although
14 Plaintiff alleges difficulty with hearing, missing two out of six
15 words spoken, Dr. Bjornstad notes that Plaintiff's hearing is
16 intact and that she is able to hear even when speaking softly and
17 when Plaintiff is not looking at her when she speaks softly. It
18 is also noted that Plaintiff has had hearing difficulties since
19 birth but that she has been able to complete school and even
20 additional college education and maintain work without apparent
21 problems stemming from her hearing impairment. (AR 20). Finally,
22 the ALJ indicated that it appears that Plaintiff goes to her
23 physicians to document her disability rather than primarily for
24 care or treatment. (AR 21).

25 Based on the foregoing, to reject Plaintiff's allegations of
26 total disability, the ALJ appropriately noted a lack of supporting
27 objective medical evidence, *Bunnell v. Sullivan*, 347 F.2d 341, 345
28 (9th Cir. 1991), general inconsistencies with her allegations, her

1 reports and the evidence of record, *Nyman v. Heckler*, 779 F.2d
2 528, 531 (9th Cir. 1986), inconsistency with her alleged level of
3 functioning and her reported daily activities, *Fair*, 885 F.2d at
4 603, and evidence of disability seeking behavior. Accordingly,
5 after reviewing the record, it is apparent that the ALJ provided,
6 specific, clear and convincing reasons, supported by the
7 substantial weight of the record evidence, for finding Plaintiff
8 not entirely credible. The Court finds that the ALJ did not err
9 by concluding that Plaintiff was not totally credible in this
10 case. (AR 22).

11 CONCLUSION

12 Having reviewed the record and the ALJ's conclusions, this
13 Court finds that the ALJ's decision is supported by substantial
14 evidence and free of legal error. Based on the foregoing, the
15 undersigned concludes that the ALJ properly determined that
16 Plaintiff is not disabled within the meaning of the Social
17 Security Act. Accordingly,

18 **IT IS ORDERED:**

19 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec.**
20 **9**) is **DENIED**.

21 2. Defendant's Motion for Summary Judgment (**Ct. Rec.**
22 **14**) is **GRANTED**.

23 3. The District Court Executive is directed to enter
24 judgment in favor of Defendant, file this Order, provide a copy to
25 counsel for Plaintiff and Defendant, and **CLOSE** this file.

26 **DATED** this 7th day of August, 2006.

27 s/Michael W. Leavitt
28 MICHAEL W. LEAVITT
UNITED STATES MAGISTRATE JUDGE